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No. 588

Supreme Court of the United States

OCTOBER TERM, 1964

C. E. RUSS, *Petitioner,*

v.

SOUTHERN RAILWAY COMPANY, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

	Page
Opinions Below	1
Question Presented	1
Statement	2
Reasons for Denying the Writ	6
Conclusion	11

CITATIONS

Cases:

Brotherhood of Locomotive Eng'rs v. *Louisville & N.R.R.*, 373 U. S. 33 (1963) 7, 8, 9
United Steelworkers v. *American Mfg. Co.*, 363 U. S. 564 (1960) 8
United Steelworkers v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960) 8
United Steelworkers v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960) 8

Statute:

Railway Labor Act:

§ 3 First (m), 45 U.S.C. § 153 First (m) 6
§ 3 First (p), 45 U.S.C. § 153 First (p) 2, 4

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OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 334 F.2d 224.

QUESTION PRESENTED

An engineer and a fireman, members of the same train crew, violated a railroad's operating rules, and a fatal accident resulted. Both men were discharged for the rules violations. The fireman was later reinstated as a matter of leniency. The National Railroad Adjustment Board ordered reinstatement of the engineer and

awarded him back pay to the date of the fireman's reinstatement. The Board rested its decision on the ground that the disparity in the treatment of the two employees could not be justified and treated as irrelevant the differences in their respective responsibilities for the safe operation of the train.

The question presented is whether, in a suit by the engineer under § 3 First (p) of the Railway Labor Act to enforce the monetary portion of the award, the Court of Appeals erred in determining that the Board had acted arbitrarily in holding that, without regard to the engineer's greater degree of responsibility for the safe operation of the train, he should receive back pay to the date of the fireman's reinstatement.

STATEMENT

On May 8, 1958, respondent's train, on which petitioner was the locomotive engineer (69a-70a, 324a)[1] and one J. D. Cox the fireman (80a, 133a-134a, 343a), collided with a track motor car operated by another employee of respondent (105a, 327a). The motor car operator was killed in the accident (105a, 327a-328a). Prior to the accident petitioner had been advised that the motor car was on the track ahead of the train (71a, 329a). Under respondent's rules, petitioner was obligated to operate the train at a reduced speed so that the train could be stopped short of any obstruction on the tracks (26a-29a). Petitioner did not do so, and the train collided with the motor car.

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[1] Page references with an "a" suffix are to the pages of the Appendices to the Briefs in the Court of Appeals. These Appendices have been certified as the Record for use in connection with the Petition.

After a formal investigation of the accident, at which petitioner and other employees appeared (303a-421a), both petitioner and Cox were discharged on May 15, 1958, for violating respondent's safety rules (283a-284a). Some four months later, on September 27, 1958, Cox was reinstated without back pay as a matter of leniency (281a, 424a).

Ultimately, petitioner's and Cox's collective-bargaining representative, the Brotherhood of Locomotive Engineers, presented to the National Railroad Adjustment Board a claim for back pay for Cox from the date of the accident and a claim for reinstatement and back pay for petitioner (283a). The Board, although finding that the proximate cause of the accident was the failure of the motor car operator to adhere to various safety rules (281a), determined that both petitioner and Cox had also violated respondent's rules:

> "A warning had been given that a track motor car was in the area ahead. The obligation then existed to operate the train at a reduced speed, prepared to stop within the assured clear distance ahead. The accident was, per se, evidence of the violation of the rule." (281a).

On the basis of this finding, the Board denied the claim of Cox (282a). The Board ordered, however, that petitioner be reinstated and be given back pay from September 27, 1958, the date of Cox's reinstatement (*ibid.*). The Board's reasoning was as follows:

> "[T]he docket . . . discloses that on September 27, 1958, claimant J. D. Cox was restored to service on a leniency basis, without pay for time lost, as carrier was of the opinion the discipline thus far assessed was sufficient punishment for his offense. The organization makes no reply to this position. *The issue is not one of the degree of*

> ***claimants' responsibilities and we need not define the extent of each.*** **The carrier having determined that the punishment for one was sufficient, there is a wide disparagement in the punishment of the other, which cannot be justified." (281a-282a, emphasis added.)**

Respondent thereafter reinstated petitioner (17a) but it did not comply with the Board's order that he receive back pay dating from the time Cox was reinstated. In accordance with § 3 First (p) of the Railway Labor Act, petitioner brought an action in the United States District Court for the Eastern District of Tennessee seeking enforcement of the monetary portion of the Board's order (5a, 17a). Under that section, such an action is to "proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated . . . ."

A trial *de novo* was held in the District Court, at which respondent introduced evidence that petitioner bore much greater responsibility than Cox for the safe operation of the train (258a-260a). The Court, however, made no reference to this evidence and enforced the Board's order (43a, 57a). It agreed with the Board that petitioner had violated respondent's safety rules (53a) but, nevertheless, held that the discharge of petitioner was too severe in light of his age, prior service and accident-free record (56a).

On appeal, the United States Court of Appeals for the Sixth Circuit reversed. The Court of Appeals held unanimously that both the Board and the District Court had been arbitrary in deciding that petitioner warranted no greater punishment than had been received by Cox since they had not taken into account

differences in the duties, responsibilities and fault of petitioner and Cox. The Court's holding, set out in the last operative paragraph of the opinion, was as follows:

> "Here the Board and the Court found that the engineer had violated the company rule. Neither found that the discharge was wrongful. Neither found that the railroad in discharging the engineer acted arbitrarily. We think that the award based on discrimination, without taking into account differences in duties and in the degree of responsibility and fault, was arbitrary. The monetary portion of the remedy fashioned by the Board was not final and conclusive but was subject to judicial review in a de novo trial. The money judgment entered by the District Court against the railroad was erroneous." (Petition, p. 44).

In the course of its opinion, the Court of Appeals referred to the facts developed at the trial before the District Court which showed that the duties, responsibilities and conduct of petitioner, the locomotive engineer, and Cox, the fireman, were not the same:

> "The engineer had a much greater responsibility than the fireman. He was in control of the operation of the train. The throttle and brake levers were on his side of the cab. There was an emergency brake lever on the fireman's side, which he could use only in an emergency. Every crew member was required to take orders from the engineer. The fireman was required to assist the engineer and to take orders and instructions from him. There was a difference in the salary paid for the two positions. It was the engineer who, in violation of the rule, failed to bring the train to a stop within the assured clear distance ahead after he had received a warning as to the presence of the track motor car." (Petition, p. 43).

REASONS FOR DENYING THE WRIT

This case involves no important or novel question of law but only the question whether the Court of Appeals or the District Court correctly assessed the record made on a trial *de novo* in a suit brought to enforce a money award of the National Railroad Adjustment Board. The Court of Appeals held that because of the showing in the record that petitioner bore much greater responsibility than the fireman who was working with him at the time of the accident, the Adjustment Board was arbitrary in making an award of back pay to him based on the premise that respondent could not impose more severe discipline on him than on the fireman. Whether the Court of Appeals was right in that decision--and it clearly was—is not a question that deserves review by this Court.

Contrary to petitioner's assertions, the decision below is not in conflict with any decision of this Court and presents no question under the Railway Labor Act which merits this Court's review. Nor is there any basis for the final claim of petitioner that the Court of Appeals failed properly to apply § 3 First (m) of the Act. As the opinion of the District Court and of the Court of Appeals each state at the outset, this proceeding involves an action by petitioner to enforce the monetary portion of an award and order of the National Railroad Adjustment Board. Under § 3 First (m) of the Act, such money awards are expressly declared not to be "final and binding"[2] and, as the Act provides and the decisions of this Court and the lower

[2] Section 3 First (m) of the Railway Labor Act provides that "awards [of the Board] shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award."

Federal courts confirm, are enforceable, if resisted, only after a full trial in a Federal District Court.

There is no doubt that the Court of Appeals applied a correct standard in reviewing the Adjustment Board's money award. Such "money awards," whatever may be the case as to non-monetary awards, are not "final and binding" and require for their enforcement a trial *de novo* in a Federal District Court. This was explicitly recognized by the Court in *Brotherhood of Locomotive Eng'rs* v. *Louisville & N.R.R.*, 373 U.S. 33, 40-41 (1963):

> "We do not deal here with nonmoney awards which are made 'final and binding' by § 3 First (m) . . . . This, then, is clearly a controversy concerning a 'money award,' as to which decisions of the Adjustment Board are not final and binding. Instead, the Act provides a further step in the settlement process. If the carrier does not comply with the award, . . . § 3 First (p) authorizes the employee to bring an action in a Federal District Court to enforce the award. The lawsuit is to 'proceed in all respects as other civil suits,' but the findings and order of the Adjustment Board are to be regarded as 'prima facie evidence' of the facts stated in the complaint."

It was also recognized by Mr. Justice Goldberg in dissent in that case:

> "A money award by the Board is expressly declared by the Act *not* to be 'final and binding.' The enforcement machinery contained in subsection (p) of the Act . . . contemplates for such awards not that limited type of review applicable to 'final and binding' nonmoney awards, but a *de novo* trial before the court, subject only to the limitation, as the statute requires, that the findings of

> fact of the Board shall constitute 'prima facie' evidence." (373 U.S. at 43-44).

Thus petitioner's claim that the Court of Appeals' decision conflicts with the so-called Steelworkers Trilogy[3] is unavailing. Those cases, unlike this one,[4] involved collective-bargaining agreements which contained arbitration clauses stating that the arbitrators' decisions "shall be final and conclusively binding . . . ."[5] In these circumstances, the Court held that the merits of any grievance are for the arbitrator, and not for the court, to determine. This, of course, cannot be the case where "money awards" of the Adjustment Board are involved. Such awards, Congress has decided, are subject to *de novo* judicial review.

The only authority cited by petitioner in support of its contention that the Court of Appeals' decision is in conflict with the *Steelworkers* cases is Mr. Justice Goldberg's dissenting opinion in *Brotherhood of Locomotive Eng'rs* v. *Louisville & N.R.R.*, 373 U.S. 33 (1963). Petitioner has misconceived the import of the portion of Mr. Justice Goldberg's opinion which is quoted in the Petition. Mr. Justice Goldberg's state-

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[3] United Steelworkers v. American Mfg. Co., 363 U. S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U. S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U. S. 593 (1960).

[4] The Court of Appeals noted that the collective-bargaining agreement between respondent and petitioner's union contained no provision for arbitration. Article 32(b)(3) of the collective-bargaining agreement, quoted at page 7 of the Petition, clearly does not have the effect of rendering "money awards" of the Board "final and binding," contrary to the Railway Labor Act provisions.

[5] See, *e.g.*, United Steelworkers v. American Mfg. Co., 363 U. S. 564, 565 n. 1 (1960).

ment is here set forth, with the portion quoted by petitioner in italics:

> "The logic of *Chicago River* is that 'final and binding' awards of the Adjustment Board are enforceable in favor of, or against, either the employer railroad, the union, or the grievant employee in the federal courts. *Given the premises of Chicago River, it must follow that such enforcement proceedings are governed by federal law as declared by this Court in cases such as Steelworkers* v. *American Mfg. Co., 363 U.S. 564, Steelworkers* v. *Warrior & Gulf Co., 363 U.S. 574, and Steelworkers* v. *Enterprise Corp., 362 U.S. 593,* and, of course, that the merits of such awards are not subject to *de novo* consideration upon a petition for judicial enforcement. See *Machinists Assn.* v. *Central Airlines,* 372 U.S. 682.
>
> "Here, however, unlike *Chicago River,* the Adjustment Board proceedings have ended; moreover, we are dealing not with a nonmoney award which is made specifically 'final and binding' by the statute, but with a money award which, as the majority recognizes, is governed by different considerations and is treated differently in the statute itself. A money award by the Board is expressly declared by the Act *not* to be 'final and binding'." (373 U.S. at 42-43).

As the full quotation shows, the italicized portion did not relate to monetary awards, which are specifically stated not to be "final and binding", but rather to non-monetary awards. This case presents no issue as to the reviewability by the courts of non-monetary awards.[6]

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[6] The record below disproves petitioner's contention that the action instituted in the District Court in part sought enforcement of the Board's reinstatement award and was not solely for enforcement of the Board's monetary award. As the record shows, petitioner was reinstated by the respondent, and at no point in the proceedings either in the District Court or the Court of Ap-

Petitioner's second claim is that "the decision below could cause havoc and instability to the already tenuous area of labor relations in this industry." (Petition, p. 31). This claim is based on an erroneous view of what the Court of Appeals decided in this case. As petitioner sees it:

> "The court below has accepted the contention of the respondent that the carrier, under the facts presented, possesses the managerial prerogative or unilateral authority to make rules, to finally interpret them, to unilaterally determine a violation of these rules, and, upon finding a violation, to assess discharge or punishment therefor which cannot be modified by the National Railroad Adjustment Board in the absence of a finding that the discharge was wrongful or that the railroad in discharging the petitioner acted arbitrarily." (Petition, p. 21).

The language of the Court of Appeals set forth at page 5, *supra,* shows that these assertions do not accurately describe the holding of the Court of Appeals. The Court held that the Board's determination that petitioner and Cox should have received equal

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peals was there any issue as to whether petitioner should or should not be reinstated. Instead, in both courts the proceedings were solely in terms of the enforcement of the Board's monetary award. Thus, the pre-trial order of the District Court, agreed to by counsel for the parties and stated to be binding at the trial, provided that the action was brought "to enforce the monetary provision of Award No. 19846 . . . , said monetary provision being that defendant should pay the plaintiff back pay from September 27, 1958 until plaintiff's reinstatement as a locomotive engineer, which occurred May 29, 1961." (17a). In keeping with this pre-trial order, neither the District Court nor the Court of Appeals dealt with the claim now advanced by petitioner that part of the back pay requested involved enforcement of the reinstatement portion of the Board's award.

punishment was arbitrary and erroneous since the Board did not consider whether they had equal responsibilities. This determination raises no issue which warrants review by this Court. It involves a unique factual situation, fully canvassed by the court below and not likely ever again to arise. Whether or not decided correctly—and respondent believes that it was—the question is not one meriting this Court's attention.

CONCLUSION

For the foregoing reasons the Petition should be denied.

Respectfully submitted,

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